

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN -9 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0170-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARGARITO URIAS RUBIO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR 2003-078

Honorable Robert Duber, II, Judge

REVIEW GRANTED; RELIEF DENIED

Daisy Flores, Gila County Attorney
By June Ava Florescue

Globe
Attorneys for Respondent

Margarito Rubio

Phoenix
In Propria Persona

PELANDER, Chief Judge.

¶1 Pursuant to a plea agreement, petitioner Margarito Urias Rubio pled guilty to an amended charge of attempted possession of a dangerous drug for sale, a class three felony committed in December 2002. The state dismissed two other pending felony counts against

him. The trial court sentenced Rubio to a presumptive, 3.5-year prison term and refused his request to order this sentence to be served concurrently with a seven-year federal sentence he was already serving for a related drug-trafficking offense.

¶2 Rubio filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., and the trial court appointed counsel to represent him. Counsel eventually filed a notice of review pursuant to Rule 32.4(c)(2), stating that she had reviewed the record but had found no colorable post-conviction claims to raise. Pursuant to Rule 32.4(c)(2), the trial court allowed Rubio to file a petition pro se. *See Lammie v. Barker*, 185 Ariz. 263, 264, 915 P.2d 662, 663 (1996).

¶3 In his petition, Rubio presented two issues. First, he claimed that trial counsel had rendered ineffective assistance at sentencing and, second, that the trial court had erroneously denied Rubio's pretrial motion to suppress evidence. Rubio also asked the court to appoint different counsel to represent him, contending his Rule 32 counsel's failure to find any post-conviction issues to raise had left him effectively unrepresented. The trial court first denied Rubio's request for different or additional counsel, then ruled that his ineffective assistance claim lacked merit.¹

¹Although the trial court apparently did not expressly rule on Rubio's second claim that the court had erred in denying his motion to suppress, Rubio waived that claim by pleading guilty. *See State v. Lerner*, 113 Ariz. 284, 285, 551 P.2d 553, 554 (1976) (defendant's pleading guilty waived right to challenge denial of motion to suppress); *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (guilty plea waived claimed defects in grand jury proceedings); *State v. Crocker*, 163 Ariz. 516, 517, 789 P.2d 186, 187 (App. 1990) (constitutionality of statute defining offense not jurisdictional issue and

¶4 Below, Rubio alleged he had agreed to plead guilty based on trial counsel’s misrepresentation or “false promise” that Rubio’s sentence in this matter would be made concurrent with his federal sentence. Rubio further claimed counsel had failed to inform him “that [the] court had discretion to impose a concurrent or consecutive sentence” and had also failed to apprise the court at sentencing of the many benefits of Rubio’s participating in a drug abuse program available to selected federal prisoners, for which he would only be eligible if his Arizona sentence were concurrent with his federal sentence.

¶5 The trial court denied relief because the transcript of the change-of-plea hearing did not bear out the first of Rubio’s contentions, showing instead that the court had clearly and repeatedly informed Rubio before he pled guilty that his sentence could be either concurrent or consecutive to his federal sentence. Although the trial court’s order denying relief did not mention it specifically, Rubio’s second claim of ineffectiveness—that counsel had failed to advocate effectively for the rehabilitative benefits of a concurrent sentence—is likewise belied by the transcript of the sentencing hearing. It reflects that Rubio’s trial counsel did explain and argue to the court the different effects a concurrent or consecutive state sentence would have on Rubio’s classification in the federal prison system and on his eligibility for rehabilitation programs available to selected federal prisoners. The transcript

therefore waived by defendant’s pleading guilty to offense). In any event, Rubio has abandoned the claim in his petition for review.

also shows Rubio personally addressed the court and alluded to some of the same considerations.

¶6 In short, we cannot say the trial court abused its discretion in denying Rubio’s petition for post-conviction relief. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (reviewing court will not reverse trial court’s grant or denial of post-conviction relief “unless an abuse of discretion affirmatively appears”). Rubio’s ineffective assistance claim rested on assertions of fact that were squarely refuted by the record, and he failed to show trial counsel’s performance had departed from the prevailing professional standard of care. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶7 In his petition for review, Rubio claims for the first time that counsel was instead ineffective for failing to object to an allegedly inaccurate statement in the presentence report and that the trial court’s reliance on that erroneous report resulted in an illegal sentence. According to Rubio, the presentence report mistakenly states that the present offense is “his third known felony conviction for an offense related to sale or transportation of drugs” when, in fact, Rubio claims, “prior to sentencing [he] had only been sentenced to two prior felonies.” Although it appears Rubio has simply misconstrued the statement in the presentence report, we would not consider his claim in any event. Unless the lower court has had an opportunity to consider and rule on an issue, there is no decision by the trial court for us to review. *See Ariz. R. Crim. P. 32.9(c)* (“[A]ny party aggrieved may

petition . . . for review of the actions of the trial court.”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980).

¶8 We grant the petition for review but deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge